

1614439 (Migration) [2018] AATA 5984 (10 December 2018)

1.

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1614439
MEMBER:	Ian Garnham
DATE:	10 December 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 10 December 2018 at 9:46pm

2. **CATCHWORDS**

3. *MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – application must have been lodged within 28 days of the relevant day – knowingly provided false and misleading information – inconsistent evidence – paternity test – fraud – deception – no compelling or compassionate reasons justifying granting of visa – decision under review affirmed*

4.

5. **LEGISLATION**

Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994 (Cth), Schedule 2, cls 820.211, 820.224; Schedule 3, Criterion 3001; Schedule 4, Public Interest Criterion 4020
Family Law Act 1975 (Cth), ss 69Q, 69U

6.

7. **CASES**

Arora v MIBP [2016] FCAFC 35
Babicci v MIMIA (2005) 141 FCR 285
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
MZYPZ v MIAC [2012] FCA 478
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42
Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 August 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 25 February 2016. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.820.211(2)(d) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the visa applicant did not satisfy Schedule 3 criterion 3001 and there were not compelling reasons for not applying the Schedule 3 criteria.
3. The applicant appeared before the Tribunal on 24 May 2017 to give evidence and present arguments. The Tribunal also received oral evidence from his wife, [who] is also his sponsor.
4. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. Migration and previous relationship background of the parties:

7. The visa applicant is [age] and has an extensive migration history. He is a citizen of Vietnam and first came to Australia [in] 2008 on a [temporary] visa that ceased to have effect on 30/01/2013. He came with his claimed former spouse. He was named as a secondary applicant in a joint protection visa application with his claimed former spouse that was lodged 30/12/2010 and refused by the Department on 03/03/2011. The applicants sought review of this decision and on 13 February 2012 the former Refugee Review Tribunal (RRT) affirmed the decision¹.
8. The visa applicant departed Australia on [day]/06/2012 and returned on [day]/07/2012. On 11 October 2012 he was found not to meet the guidelines for a Public Interest Guidelines Assessment. On 23/12/2013 the visa applicant was granted a further [temporary] visa as a dependant spouse and this visa ceased to have effect on 15/03/2014.
9. On 26/02/2014 the visa applicant lodged an application for a [temporary] visa and the application was refused by the Department (DIBP) on 08/08/2014. The visa applicant sought review of this decision with the former Migration Review Tribunal (MRT) and on 13/01/2016 the MRT (now the AAT) found there was no jurisdiction to review the decision².
10. The visa applicant then lodged this Partner visa application on 25 February 2016.

¹ RRT - 1102352

² AAT - 1414313

11. In the application the visa applicant claimed one previous spousal relationship where he married on [day]/12/2006 and divorced [day]/01/2014. There were no children of the relationship.
12. The sponsor is [age] and in the application claimed that she first arrived in Australia on [day]/02/2010 and became an Australian citizen [in] October 2015. In the Sponsorship Form 40SP the sponsor declared a previous spousal relationship for the period 18/08/2008 – 18/08/2015 which produced no children. In the same form, at question 28, the sponsor declared that she had not been in a de facto relationship with a person other than the visa applicant. However, at Part L (additional information) of this form a de facto relationship is declared without a beginning date, it ended in 1998 and produced one child, born [date], who is now [age] and lives with the parties.
13. In the delegate's Decision Record they commented that the previous visa applications of the visa applicant, including the protection visa claim, were unmeritorious.
14. Before leaving the past migration background of the visa applicant I make the following observation after reading the decision record of the MRT. The review was of the visa applicant's presumed former wife's protection visa application of 2012 (1102352) claim. He was a secondary dependant applicant. In those reasons the member states that the primary applicant in that matter (the claimed previous spouse of the visa applicant) told the delegate that their marriage certificate was fraudulent and that she was not really ever married to the visa applicant³. In addition, the visa applicant gave evidence that he had never been in a genuine spousal relationship with his former claimed previous spouse⁴.
15. If either of these pieces of evidence is correct, it would mean that, at least the two (dependent spousal) visas that the visa applicant was previously granted, were granted based at least in part, on a fraudulent marriage certificate and/or a fictitious spousal relationship.

9. *The background to this application:*

16. In the application the parties in this matter claim that they met in 2012. At the hearing and in the application, the visa applicant claimed they began living together in March 2015.
17. With the visa application the parties provided evidence that demonstrates they commenced a joint bank account in April 2015⁵ and married [in] August 2015⁶.
18. When the application was considered by DIBP, the delegate first responded to the visa applicant's failure to hold a substantive visa within 28 days of this application and therefore found he did not meet the Schedule 3 criteria. To establish if the visa applicant was still able to meet cl.820.211(2)(d)(ii), by the consideration of any compelling reasons that exist in the parties case, that justify waiving of the Schedule 3 requirements; on 07/03/2016 the delegate wrote to the visa applicant requesting them to provide further evidence of the existence of a spousal relationship. They also requested information about any compelling reasons that should be considered when deciding if the Schedule 3 requirements should be waived.

³ At para 34a

⁴ At paras 86-89

⁵ At FF: 69- 74 (DIBP)

⁶ At F: 44 (AAT)

19. On 01/04/2016 the visa applicant's registered migration agent advised DIBP that they shared a child of the relationship – [Miss A] born on [date] and a copy of the child's birth certificate was provided.⁷ The birth certificate was registered on [date] and lists the visa applicant as the father of [Miss A]. The visa applicant did not provide any further information to demonstrate the existence of a spousal relationship.
20. On 21 June 2018 DIBP requested that the parties undergo DNA testing to establish that the visa applicant is the biological father of [Miss A] as had been claimed.
21. On 05/08/2016 the parties advised DIBP that the visa applicant is not the biological father of [Miss A] and DNA testing would not be undertaken. In the registered migration agent's submission, among other things they also stated:

*10. The visa applicant has confirmed, and the sponsor has accepted, that [Miss A] is not the biological child of the visa applicant. However, we submit that in light of the circumstances, this has no significant bearing on the genuineness of the relationship between the visa applicant and the sponsor, and that this consideration should be given little weight.*⁸
22. They also provided a copy of a letter dated 19/07/2016 indicating that on the sponsor underwent an 8 week termination of an unplanned, problem pregnancy on [day]/01/2016. This letter also states that the visa applicant attended ...*and was her support person throughout the process.*⁹
23. The delegate found that the evidence the visa applicant had provided about the spousal relationship did not support there being such a relationship; and that, the registered migration agent's claims about there being such a relationship and that the visa applicant provided care for the child, were unconvincing.
24. On 07/04/2017 the tribunal invited the visa applicant to a hearing on 27/04/2017. The day before the hearing the registered migration agent contacted the tribunal and requested a postponement of the hearing because the sponsor was overseas and could not attend the hearing and would be returning to Australia [in] May 2017. I have noted that the sponsor was outside Australia in the period; [day]/03/2017 – [day]/05/2017.
25. On 27 April 2017 the tribunal re-invited the parties to a hearing of this matter on 12 May 2017. Once again the day before this hearing the visa applicant's registered migration agent contacted the tribunal and requested a further adjournment. On 24 May 2017 the parties attended a hearing of this matter.
26. At the hearing the visa applicant again changed their evidence and claimed that they were the biological father of [Miss A]. The tribunal went to great lengths to establish that the visa applicant understood the difference between a child's biological and social parent. The visa applicant said he was educated to the equivalent of Australian year 12 studies in Vietnam and that he understood this distinction.
27. I am satisfied that the visa applicant fully understood this distinction and despite this he persistently and steadfastly maintained throughout the hearing that he was [Miss A]'s biological father. In addition, the sponsor also gave evidence to the tribunal that the visa applicant is the biological father of [Miss A].

⁷ At F: 81 (AAT)

⁸ At F: 91 (DIBP)

⁹ At F: 90 (DIBP)

28. Because of this evidence the tribunal wrote to the visa applicant on 25 May 2017 requesting that he and [Miss A] undergo DNA paternity testing to establish that he is the biological father of [Miss A]. The visa applicant did not respond to this invitation by the allotted time (15 June 2017) or at all.
29. On 28 February 2018 the visa applicant's registered migration agent wrote to the tribunal and advised that, among other things, that a further child had been born ([Mr B]) and that the parties were happy to conduct DNA testing of this child to establish the visa applicant is his biological father¹⁰. The parties included a copy of [Mr B's] Birth Certificate¹¹ which was registered on [date]. I note that the birth certificate registers the visa applicant as the child's father and at part 5 (PREVIOUS CHILDREN OF THE RELATIONSHIP) the parties have registered the sponsor's [age]yo daughter and [Miss A] as such children.
30. Due to the starkly conflicting evidence provided to the tribunal by the parties about the children, [Mr B] and [Miss A]'s paternity; on 6 September 2018 the tribunal wrote to the visa applicant outlining the conflicting evidence that had been provided by the parties throughout the processing of this application and review. The tribunal requested that the parties undergo DNA testing for both children to establish whether the visa applicant is their biological father:
31. On 27 September 2018 the registered migration agent wrote to the tribunal and advised that the visa applicant would not conduct paternity testing for their first child ([Miss A]) but would conduct testing of the second child ([Mr B]). The registered migration agent also stated:

11. However, as previously stated and submitted to both the Department and the Tribunal, the Applicant is *not* the biological father of [Miss A].¹²

32. In the registered migration agent's first submission to the tribunal, dated 26 April 2017, it was stated that the visa applicant is not [Miss A]'s biological father. In all other direct submissions to this tribunal, no other information was provided about [Miss A]'s paternity. The registered migration agent attended at the hearing and agreed with the tribunal that the unequivocal evidence of the parties at the hearing was that the visa applicant is [Miss A]'s biological father. The tribunal also took evidence from the visa applicant's registered migration agent about the parties' evidence during the hearing. He said that all of his responses had been provided in accordance with the parties instructions and that he did not know why the visa applicant had told the tribunal he was [Miss A]'s biological father. He also said that their instructions to him on the previous day had been that the visa applicant was not [Miss A]'s biological father.
33. On 10 October 2018 the tribunal wrote to the visa applicant setting out evidence that had been provided to the tribunal that indicated that the visa applicants had given false and misleading information to the Department and this tribunal. This information was summarised as follows:

At this stage the relevant facts and information before the tribunal with respect to [Miss A]'s paternity are as follows:

- *You are recorded as the biological father on [Miss A]'s ([date]) birth certificate.*

¹⁰ At F: 94 (AAT)

¹¹At F: 93 (AAT)

¹² At F: 103 (AAT)

- *On or around 1 April 2016 you presented this certificate to the Department of Home Affairs (DOHA) seeking to show that the birth of this child was a compelling reason to waive the Schedule 3 criteria.*
- *Following a request by DOHA made on 21 June 2016, to undertake DNA paternity testing for [Miss A], on 5 August 2016 you advised DOHA (DIBP) that you are not the biological father of [Miss A].*
- *At the tribunal hearing, from the outset you insisted that you are the biological father of [Miss A]. The majority of the hearing was devoted to explaining to yourself and the sponsor the difference between a child's biological and social parent.*
- *You acknowledged that you understood this distinction but still maintained throughout the entire hearing that you are [Miss A]'s biological father.*
- *Your advice of 27 September 2018 states that you have again changed your evidence with respect to [Miss A]'s paternity and are now stating you are not her biological father.*
- *Given your willingness to repeatedly provide false evidence to DOHA (DIBP) and this tribunal about the paternity of [Miss A], the tribunal is unable to accept any evidence you provide on face value.*

34. The tribunal also put the visa applicant on notice that the requirements of Public Interest Criterion (PIC 4020) may apply in this matter and invited the visa applicant to submit considerations for the tribunal to consider in respect to compassionate or compelling circumstances that justify granting of the visa:

12. The tribunal considers that it is likely that it will be required to apply PIC 4020 to the facts of this matter.

You are therefore invited to provide the following information in writing:

a) compelling circumstances that affect the interests of Australia; or

b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; that justify the granting of the visa.

35. On 23 October 2018 the tribunal received a Parenting Testing Procedure Report that confirmed the visa applicant is the biological father of [Mr B]¹³, the second child.

36. On 7 November 2018 the visa applicant's registered migration agent provided a submission in response to the PIC 4020 issues raised by the tribunal (the most recent submission)¹⁴.

13. The matters to be reviewed:

37. The tribunal would normally restrict itself to a consideration of whether the visa applicant meets cl.820.211(2)(d), in accordance with the original decision conducted by the delegate and the Presidential Direction of this tribunal:

¹³ At FF: 108-112 (AAT)

¹⁴ At FF: 122 (AAT)

14. 8.2 As a general rule, where the Minister for Immigration (Minister) or delegate has made an adverse decision on particular criteria or issues, the AAT should restrict its review to those matters.¹⁵

38. However, due to the course this matter has taken, and my understanding of the visa applicant's conduct with the evidence they have provided throughout, and, when that evidence was provided, I consider it relevant and appropriate to test the visa applicant's compliance with Public Interest Criterion 4020 (PIC 4020) before considering the matter decided by the delegate.

39. Clause 820.224(1)(c) requires that the visa applicant satisfy PIC 4020 at the time of decision.

15. Consideration:

40. Therefore the first issue to determine in this review is whether the visa applicant meets PIC 4020 as required by cl.820.224(1)(c) for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

41. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

42. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading'

¹⁵ AAT Presidential Direction 8.2

statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

43. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
44. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

16. Potential 1st breach of PIC 4020 – submissions made to DIBP:

45. The child, [Miss A] was born on [date] and the birth was registered on [date]. The application was lodged on 25 February 2016 and at question 31 of the application form (Form 47SP) [Miss A] is recorded as the visa applicant's child. On 1 April 2016, in a response to a request for putative compelling reasons to waive the Schedule 3 criteria the visa applicant advised DIBP that they shared a child of the relationship and a copy of the child's birth certificate was provided. After DIBP requested DNA evidence to establish [Miss A]'s paternity, on 5 August 2016, the visa applicant said he was not the biological father of [Miss A].
46. Aside from potentially providing false and misleading information at registration, to the Registry of Birth Deaths and Marriages; as above, on two occasions the visa applicant via their registered migration agent, have represented to the DIBP potentially false and misleading evidence in a material particular. Firstly when the application was lodged in February 2016 it contained evidence that stated [Miss A] is the visa applicant's child as set out above. Secondly, on 1 April 2016 when DIBP requested further information your registered migration agent stated; *The couple's child, [Miss A] was born on [date]*. And a copy of the birth certificate was provided.
47. I consider that in both of these instances a material particular of the information provided was the biological fatherhood of the child. I am also satisfied, due to the course of events that this matter has taken, that the information claiming that the visa applicant is the visa applicant is the biological father of [Miss A] is false and that he is not the biological father of [Miss A]. Therefore the information given in these two instances, including the submission of the birth certificate, that stated the visa applicant is the biological father of [Miss A] is false and misleading and it is information that is relevant to a number of criteria the Minister may consider when considering a subclass 820 visa application.
48. I am also satisfied, in both instances; that the information was false and misleading at the time it was given to DIBP and further that the applicants knowingly provided the false and misleading information and it was not given innocently or accidentally. I have reached this view primarily due to the conduct of the parties that has been set out above in detail and the evidence they have provided to demonstrate their relationship is genuine and continuing, at that time, simply does not do so. In other words I am satisfied that a necessary element of fraud and deception was present for both the visa applicant and/or his sponsor.

49. In respect of the relationship the delegate was not convinced that a genuine relationship between the parties existed based on the material they provided with the application:

17. *...you have provided limited documentary evidence to demonstrate how you have significantly combined your lives, or of having resided together. You have provided no further evidence to demonstrate your mutual commitment to each other. Moreover, the fact you have provided inconsistent, and possibly fraudulent, information regarding the parentage of your child raises serious concerns about the genuineness of your relationship.*

50. The key evidence of the relationship that was provided with the application comprised; Bank statements for a joint bank account in the period; 21 April 2015 – 30 December 2015, 3 third party statutory declarations attesting to the genuineness of the relationship, a collection of photographs, and divorce certificates for both of the parties.

51. The bank statements demonstrate credits of sums transferred from different bank accounts, followed by rapid cash withdrawals of those sums, the transactions do not reflect joint family spending by parties in a genuine relationship. Two of the third party declarations are made by persons who lived and worked with the visa applicant and the third is made by a claimed business owner of a shop that the visa applicant frequented and they later became friends. The declarations are similarly worded and lack any specific detail and overall are unconvincing as proof of the relationship. Similarly, the photographic information does not provide convincing evidence of the relationship and the divorce certificates demonstrate that the visa applicant and sponsor divorced from previous claimed partners in January 2014 and August 2015 respectively, after they claim to have begun living together in March 2015. The inadequacy of this information, to demonstrate a bona fide genuine and continuing relationship led the delegate to request further information about the relationship. A request that the visa applicant did not respond to.

52. However, with submissions to this tribunal the visa applicant has provided further information about the relationship as follows:

- Airline information that shows the parties travelled with [Miss A] to the Gold Coast in the period; 18/09/2016 – 20/09/2016.¹⁶
- Medical information dated late 2016 – early 2017 relating to the early pregnancy of the sponsor.¹⁷
- Further photographs of the parties, many also include the children.¹⁸
- Further third party witness statements and statutory declarations.¹⁹
- Bank statements of joint account transactions for the period 01/07/2016 – 30/12/2016 that is more reflective of family spending²⁰

53. After consideration of all of the documentary evidence that has been provided by the visa applicant about the relationship, at the different stages of this matter, I consider

¹⁶ At FF: 34-37 (AAT)

¹⁷ At FF: 40-41 & 55 (AAT)

¹⁸ At FF: 42-44, 91-92 & 119-120 (AAT)

¹⁹ At FF: 45-51 (AAT)

²⁰ At FF: 38-39 (AAT)

the first in time, reliable evidence that the parties may have been living as a couple is the medical letter about the termination of a pregnancy (as discussed above at paragraph 22 above), that occurred on [day]/01/2016.

54. At the hearing, the visa applicant said that the last time he saw his former presumed wife was when the divorce papers were lodged at some-time before December 2013. He later said that he last saw her in late 2014 when they separated and she left the house they were both living in shortly before he claims to have begun a relationship with his sponsor. Clearly these statements about when his previous presumed relationship ended are incompatible.
55. At the hearing he also said that at the time he began his relationship with the sponsor she was also seeing another person. However this did not prevent him from insisting during the hearing that he was [Miss A]'s biological father.
56. In the registered migration agent's most recent submission the visa applicant has claimed that, on 1 April 2016, when he submitted the birth certificate to DIBP he believed that he was the biological father of the child and that the sponsor had engaged in an infidelity and hidden this from the visa applicant.
57. Based on all of the evidence provided by the visa applicant about the relationship I am not satisfied that it began when he has claimed (March 2015). [Miss A] was conceived in mid-December 2014 and as stated above there is no reliable evidence before the tribunal that the parties were in a genuine relationship until at least January 2016. I therefore am not satisfied that, at any time, the visa applicant and sponsor could have genuinely believed that the visa applicant is the biological father of [Miss A].
58. In addition, the past behaviour of the visa applicant with respect to his previous visa applications (see paragraphs 14 & 15) and this visa application and, the evidence he has provided to this tribunal indicate that he will wantonly provide false and misleading evidence to promote his prospects of a successful migration outcome.
59. I am therefore satisfied that the visa applicant did knowingly represent to DIBP that he was the biological father of [Miss A], when he knew he was not, in the two instances I have identified above.

18. Potential 2nd breach of PIC 4020 – submissions made to the tribunal:

60. Via the registered migration agent, on 05/08/2016, the visa applicant obliquely admitting to DIBP that the visa applicant is not the biological father of [Miss A] (as set out at paragraph 21 above). Perhaps this expression is a typographical error, but I would have thought the biological gender of the parties ensured that the supposed discovery of the visa applicant's non fatherhood was for the sponsor to *confirm* and the visa applicant to *accept*.
61. Nevertheless, the fact remains that the visa applicant insisted throughout the hearing that he is the biological father of [Miss A] before again retracting and advising the tribunal he is not the biological father; via the registered migration agent's submission of 27 September 2018. I note that this admission was again only provided after refusing two more requests by the tribunal to conduct DNA paternity testing. These facts are fully set out at paragraphs 25 – 34 above.
62. In the recent submission the registered migration agent has attempted to explain the visa applicant's evidence at hearing due to a lack of coherence:

19. ...submit that, as previously submitted to the Tribunal, the Applicant's psychological state during the course of the hearing was significantly impaired and was not at its normal standard. The Applicant's psychological state, comprehension of facts, and coherence had caused him to mistake his understanding of "biological parentage" with what he feels is his own relationship with, and parentage of, the child.

63. I do not accept this explanation. I have listened to a recording of the hearing and consider the question was fully explained in a non-threatening manner and the visa applicant indicated he fully understood the distinction between biological and social parentage. He claims he has had secondary education and he has attended tribunal hearings previously and given evidence.
64. I consider the conduct (to knowingly provide false and misleading evidence in a material particular) before the tribunal, was used by the visa applicant on this occasion to prolong the processing of this matter. By so doing he has been able to await the birth of his biological child for which the parties rapidly conducted DNA testing when requested. I believe he did so to manipulate his circumstances to increase the likelihood of a decision maker finding that those circumstances are compelling.
65. After delving further into the migration background of the visa applicant's peculiar and somewhat bizarre behaviour with respect to their evidence for the current application I consider it reflects a habitual practice to readily provide false evidence to the Minister or this tribunal to achieve the migration outcome he is seeking.
66. I am therefore satisfied that, at the hearing, the visa applicant did knowingly represent to this tribunal that he was the biological father of [Miss A], when he knew he was not, as I have identified above.
67. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

68. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
69. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
70. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
71. The visa applicant's registered migration agent has submitted, a number of times that the tribunal should adopt a finding that [Miss A] is the visa applicant's biological child pursuant to section 69Q of the *Family Law Act 1975*:

20. **69Q Presumption of paternity arising from cohabitation**

21. If:

- (a) a child is born to a woman; and
- (b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married;

22. the child is presumed to be a child of the man.

72. This tribunal does not have jurisdiction with respect to the Family Law Act. In any event, even if a Court did consider that section 69Q may apply; and the facts of this matter were known, the following section of that Act would certainly apply to extinguish any presumption of paternity established by the visa applicant:

23. **69U Rebuttal of presumptions etc.**

(1) A presumption arising under this Subdivision is rebuttable by proof on a balance of probabilities.

(2) Where:

- (a) 2 or more presumptions arising under this Subdivision are relevant in any proceedings; and
- (b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings;

24. the presumption that appears to the court to be the more or most likely to be correct prevails.

25. (3) This section does not apply to a presumption arising under subsection 69S(1).

73. Based on the parties own current evidence, and all of the evidence discussed above, on the balance of probabilities, a presumption of [Miss A] being a child of the visa applicant is certainly rebuttable.

74. The submissions have also argued that the visa applicant shares the care of now 2 young children who are Australian citizens. As was expressed by the delegate, based on the evidence before them, they were also not satisfied that the visa applicant necessarily does provide care for the then one child.

75. For the reasons I have given above, the evidence that has been provided about the relationship is unconvincing, especially in its origins. Some of the recent evidence I have received (as identified at paragraph 51) does demonstrate some family involvement by the visa applicant. However I cannot consider this in isolation when considering putative compelling reasons that justify granting of the visa. The evidence before me about the relationship (and concerning the period before the lodgement of the application) and any care that the visa applicant may have provided for [Miss A] alone is inadequate and unconvincing.

76. I have carefully considered the rights and interests of both children and the sponsor. I note that the sponsor is ethnic Vietnamese and has family in Vietnam as does the visa applicant. The sponsor has travelled to Vietnam, with [Miss A], in the periods; [day]/03/16 -[day]/04/2016 & [day]/03/2017 – [day]/05/2017. I have also considered the statements made by one of the visa applicant's sisters²¹ and father²² and their desire for the parties to return to Vietnam to celebrate their union. The evidence

²¹ At F: 46 (AAT)

²² At F: 45 (AAT)

before me indicates that if the parties were to do so they would have the care and support of their families to care for the young children.

77. In these circumstances, I do not consider that there are compelling reasons that justify the granting of the visa.
78. Therefore the requirements of PIC 4020 (2) should not be waived.
79. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.820.224(1)(c).

26. Does the visa applicant meet cl.820.211(2)(d)?

80. The tribunal went on to consider whether the visa applicant meets this criterion.

SCHEDULE 3 CRITERIA (cl.820.211(2)(d))

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

81. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
82. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

83. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
84. In this case the relevant day is the last day that the visa applicant held a substantive visa. The visa applicant was granted a [temporary] visa on 23/01/2013 that ceased to have effect on 15/03/2014. Since that time the visa applicant has held bridging visas only. This application was lodged on 25/02/2016.
85. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

86. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
87. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its

discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: MZYPZ v MIAC [2012] FCA 478 at [10]; Babicci v MIMIA (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: Waensila v MIBP [2016] FCAFC 32.

27.

28. Policy considerations:

88. The relevant Departmental policy guidelines are contained in the Procedures Advice Manual (PAM3).

89. The policy stresses that; ...the provisions are not intended to give, or be perceived to give an unfair advantage to persons who:

- *Fail to comply with their visa conditions or*
- *Deliberately manipulate their circumstances to give rise to compelling reasons or*
- *Can leave Australia and apply for a partner visa outside Australia.*

90. The discussion of the matters above and the findings I have made directly relate to these policy considerations. The evidence suggests that the visa applicant has knowingly shown a wanton disregard for visa requirements and the provision of information to both DIBP and this tribunal. He has grossly manipulated his circumstances; by giving evidence he knew to be false, delaying processing of his application and ignoring requests for further information until the after the birth of his son to give rise to compelling reasons. On its face, he can leave Australia and apply for his partner visa offshore.

91. Despite these conclusions about the visa applicant's conduct I am required to consider his putative compelling reasons as they apply at the current time.

29. Putative compelling reasons:

92. In the submissions and at the hearing the visa applicant has argued that there are 2 compelling reasons why the Schedule 3 criteria should be waived:

- The tribunal should adopt a Family Law Act provision and presume that the visa applicant is the biological father of [Miss A].
- The visa applicant is and has been for a significant period, a carer for now two young children (now [age] and [age]) and is also in a genuine and continuing relationship with their sponsor. To require the visa applicant to make an offshore application would cause unnecessary and significant detriment to those persons.

93. Provisions of the Family Law act are not relevant to this matter. In any event, I consider I have fully dealt with the first suggested compelling reason at paragraphs 70-72 above. This is not a compelling reason why the Schedule 3 criteria should be waived.

94. I acknowledge that the sponsor is now a citizen of Australia and the 2 children are Australian citizens by birth. I also acknowledge that, based on the evidence before the tribunal, the visa applicant probably currently provides some care for those children.
95. I must also consider the detriment that would be suffered by the sponsor if the visa applicant is required to go offshore for a period to lodge a partner visa application. Both the visa applicant and the sponsor in this case appear to have family support in Vietnam as I have explained at paragraph 76 above. Furthermore, no special needs of the children have been presented and the indicators are that they would also have the care and support of the parties' extended families in Vietnam. In these circumstances, I am not powerfully driven to conclude that the Schedule 3 criteria should be waived in this case.
96. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria in this case. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
97. I am also satisfied that there is no information before me that indicates that the visa applicant meets any of the alternative criteria in cl.820.211(3) – (9) (people entering Australia to marry and who have subsequently married, and death, family violence, child exceptions).
98. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

30.

DECISION

99. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Ian Garnham
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...

